IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. BRAITHWAITE	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ACCUPAC, INC. and	:	
A. BRUCE HECK	:	**NO. 00-5405**

M E M O R A N D U M

WALDMAN, J. **December 30, 2002**

I. Introduction

Plaintiff alleges that his executive employment contract with Accupac was not renewed because of his age. He has asserted claims for age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. and the Pennsylvania Human Relations Act (PHRA), 43 Pa. C.S.A. § 951 et seq. against his former employer and its CEO.[1]

Plaintiff also asserted claims for violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., and for breach of express and implied contract. On June 24, 2002, the parties stipulated to a dismissal of plaintiff's ERISA and breach of express contract claims.

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[1]It appears that the only claim asserted against the individual defendant is one for aiding and abetting under the PHRA. The only specific allegation against Bruce Heck is that he "acted as an aider and abetter when assisting to terminate plaintiff so that he could obtain the position of president for himself."

Presently before the court is the defendants' motion for summary judgment on plaintiff's remaining claims.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at

248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise viewed in the light most favorable to plaintiff, the pertinent facts are as follow.

Defendant Accupac is a family-owned business. It was established in 1974 by Anthony and Eileen Heck and their children including defendant Bruce Heck.[2] Accupac produces and packages products for the cosmetics, personal care and pharmaceutical industries from its plant in Mainland, Pa.

Before his death in 1990, Anthony Heck was President of Accupac and was primarily responsible for the company's sales and marketing. After his death, the position of President was offered to defendant Bruce Heck who declined and elected to remain Vice President of Operations. The Accupac board of directors then decided to recruit a new employee to head sales and marketing. Eileen Heck, chairperson and CEO of Accupac, learned through an acquaintance that plaintiff might be a suitable candidate for the position. Ms. Heck, then age 61,

[2]Eileen Heck remarried in 1998 and thereafter used the name Eileen Slawek. For purposes of clarity, the court consistently refers to her as Eileen Heck.

actively recruited plaintiff, then age 59. Plaintiff was hired as President of Accupac on January 6, 1992 pursuant to a written executive agreement for a term through December 31, 1994 at an annual salary of $250,000.

Plaintiff and Ms. Heck became "very close" and developed a social relationship that was "quite extensive." By October 1993 they took the first of several vacations together and socialized on numerous occasions. Bruce Heck also considered plaintiff to be a personal friend.

Although he had the title of President, plaintiff's duties were limited to sales and marketing. He requested and received the title of President because "[i]t carries more weight than when you are vice president of sales." Bruce Heck was Vice President of Operations. Plaintiff answered to Eileen Heck. In 1998, Ms. Heck gave up her position as CEO. She remained chairperson of the board and Bruce Heck became CEO. Plaintiff continued to regard Eileen Heck as the true head of Accupac.

Accupac's sales and profits increased steadily from 1992 through 1995. In 1995, Accupac had net sales of $22,532,723 and profits of $4,642,438. In 1995, plaintiff and Accupac entered into a successor employment agreement for a term through

December 31, 1999 at an annual salary of $275,000.[3] Plaintiff was then 62 years old. In 1996, sales and profits began to decline. They dropped precipitously in 1998 when Accupac had net sales of $17,684,708 and a profit of $12,848.

In the summer of 1998, Accupac's senior managers, including plaintiff, participated in off-site strategic planning meetings to improve the company's well-being. A strategic plan was formulated which included a requirement that Accupac visit "core customers" at least once a month.[4] Plaintiff did not agree with this requirement. He felt that salespeople could "wear out [their] welcome" by visiting customers at the required frequency and refused to do so. When confronted by Bruce Heck, plaintiff stated that "I am not going to guarantee you that Bob [Calabro, a sales associate who reported to plaintiff] or I will be in front of a core customer every four weeks. It may be every six weeks. It might be four weeks or two months, then it might be seven weeks."

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[3]Plaintiff and Accupac entered into a modified employment contract dated May 7, 1997. All terms of that agreement, including the December 31, 1999 expiration date, are identical to the 1995 agreement. The only difference is a paragraph about deferred compensation that was added to the 1997 agreement.

[4]As defined by Accupac, core customers are those with "product types aligned with Accupac's equipment and strategic goals and were highly stable companies with high volume products and significant chances for growth potential."

The Hecks perceived that plaintiff was increasingly less focused and engaged. For purposes of the instant motion, the court assumes to be true plaintiff's statement that in fact he was working as hard as ever to bring in business. Plaintiff was observed falling asleep at business meetings. He attributes this to the boring nature of the presentations being made. The board of directors decided in early 1999 not to renew plaintiff's contract, although he was not so advised for several months.[5]

At a social lunch in June of 1999, Eileen Heck asked plaintiff what he planned to do when his contract expired at the end of the year. Plaintiff indicated he would like to continue to work. Eileen Heck suggested that he consider retiring. She told him how much she and her present husband were enjoying their newfound leisure time and that "at your age, you should smell the roses." She noted that her current husband had "retired early" and that she didn't want to see plaintiff "get sick or unhealthy and get carried out like my Tony [company founder Anthony Heck]

[5]Eileen Heck testified that she advised plaintiff of the board's decision in April 1999. For purposes of defendants' motion, the court assumes that this did not occur. While it appears that Ms. Heck may have suggested or hinted that plaintiff's contract would not be renewed, he did not so understand her comments.

was."[6] In August 1999, Bruce Heck told plaintiff that he looked tired and suggested he take some vacation time.

On September 10, 1999, Bruce Heck officially informed plaintiff that Accupac would not renew his employment contract upon its expiration on December 31, 1999. Plaintiff was placed on fully paid leave through the end of the contract period. Defendant's stated reasons for not renewing plaintiff's contract were the marked decline in sales and profits, his refusal to comply with a key element of the strategic plan adopted to improve the company's profitability and the perception that he had become increasingly less focused and engaged.[7]

Upon plaintiff's departure, Bruce Heck assumed the additional responsibilities for sales and marketing. He was then 39 years old. In January 2000, Accupac hired Bruce Decker to assume these responsibilities as Vice President of Sales and Marketing. Mr. Decker was then 51 years old.

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[6]Defendants note with considerable force that plaintiff has not explained the absence of an attribution to Ms. Heck of any comment about age in the detailed recitation of their conversation in his earlier EEOC complaint, prepared with the assistance of counsel.

[7]The stated reason for immediately placing plaintiff on paid leave was his precipitation of conflict among certain senior managers and a negative affect on morale. Plaintiff questions this but the dispute is not material as this is not a proffered reason for the decision not to renew plaintiff's contract and it is this earlier decision on which his claims are predicated.

Shortly after plaintiff's departure, Eileen Heck learned that he had been terminated from a prior position as Vice President of Sales at Paco, a pharmaceutical packaging company, for submitting false business expense claims. Defendants aver that plaintiff would never have been engaged had this information then been known to them. There is, however, no evidence that anyone at Accupac made any inquiry of Paco or plaintiff into the circumstances of his departure or his history with Paco before offering to contract for his services.

On June 22, 2000, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC).

IV. Discussion

A. Age Discrimination

The same general standards and analyses apply to ADEA and PHRA discrimination claims. See Connors v. Chrysler Financial Corp., 160 F.3d 971, 972 (3d Cir. 1998). To maintain suit under the PHRA, however, a plaintiff must file a verified administrative complaint with the PHRC within 180 days of the alleged act of discrimination. See 43 P.S.A. § 959(h). Defendants assert that plaintiff's PHRA claim is thus time barred. Plaintiff acknowledges that he filed his administrative charge 286 days after being told that his contract would not be renewed. He contends that his PHRA claim nevertheless is viable

because he timely filed with the EEOC which has a work sharing agreement with the PHRC.

In a deferral state with a work sharing agreement, like Pennsylvania, a plaintiff may file an administrative charge with the EEOC within the extended 300 day period. See Bailey v. United Airlines, 279 F.3d 194, 197 (3d Cir. 2002); Malone v. Specialty Products & Insulation Co., 85 F. Supp. 2d 503, 505 (E.D. Pa. 2000). To preserve a PHRA claim, however, an administrative charge must be filed with the PHRC within 180 days of the alleged act of discrimination. See Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.), cert. denied, 522 U.S. 914 (1997). A charge is deemed filed with the PHRC when it is filed with the EEOC. See Shaver v. Corry Herbert Corp., 936 F. Supp. 313, 318 (W.D. Pa. 1996). Thus, the filing of an administrative claim within the 300 day EEOC deadline but beyond the 180 day PHRA deadline does not preserve a PHRA claim. See Sharp v. BW/IP Intern., Inc., 991 F. Supp. 451, 457 (E.D. Pa. 1998).

Plaintiff's PHRA claim is time barred.[8]

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[8]This would appear to relieve the individual defendant of all liability in the case. The only explicit allegation against him is that he "acted as an aider and abetter" by "assisting to terminate plaintiff." An individual may be liable under the PHRA as an aider and abettor. See 43 Pa. C.S.A. § 955(e); Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552-53 (3d Cir. 1996). There is, however, no individual liability under the ADEA. See Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996); Kennedy v. Chubb Group of Ins. Companies, 60 F. Supp. 2d 384, 390 (D.N.J. 1999). In assessing plaintiff's ADEA claim, the court nevertheless considers Mr. Heck to be a decisionmaker since one could reasonably infer from the totality of the record that he participated in the decision not to renew plaintiff's contract.

Plaintiff can sustain a claim of discrimination under the ADEA by presenting either direct or circumstantial evidence of discrimination. See Duffy v. Magic Paper Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001).

Direct evidence is overt or explicit evidence that directly reflects a discriminatory animus by a decisionmaker. See Armbruster v. Unisys Corp., 32 F.3d 768, 778 (3d Cir. 1994). Direct evidence must be sufficient to support a finding that the age animus of a decisionmaker was a substantial factor in the adverse action. See Fakete v. Aetna, Inc., 308 F.3d 335, 338 (3d Cir. 2002) (direct unambiguous statement by decisionmaker that new management was looking to employ "younger" workers). Such evidence must lead to a "ready logical inference of bias" from which one may reasonably presume that the person expressing such bias acted on it. Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1097 (3d Cir. 1995).

Where it appears from direct evidence that illegal discrimination was a substantial factor in an adverse employment decision, the burden shifts to the employer to show that the decision would have been the same in the absence of consideration of the impermissible factor. See Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989)(O'Connor, J., concurring); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1113 (3d Cir. 1997); Jones v. School Dist. of Phila., 19 F. Supp. 2d 414, 417-18 (E.D.

Pa. 1998). Where a plaintiff does not present direct evidence of discrimination, he may nevertheless survive summary judgment on a pretext theory under the McDonnell Douglas burden-shifting framework. See Keller, 130 F.3d at 1108.

After arguing pretext at some length, plaintiff suggests that the remarks about retirement and vacation time made respectively by Eileen and Bruce Heck constitute direct evidence of age discrimination. It is not inherently discriminatory to discuss retirement plans with an employee. See EEOC v. MCI Int'l, Inc., 829 F. Supp. 1438, 1449 (D.N.J. 1993). See also Moore v. Eli Lilly & Co., 990 F.2d 812, 818 (5th Cir. 1993) (statement by supervisor to employee of thirty years that if he were in plaintiff employee's position "he would be out seeing the world" does not demonstrate age bias). The reference to age attributed to Ms. Heck was not derisive or antagonistic. Every comment or reflection about age, particularly by one who is herself in the protected age class, does not evince discriminatory animus. See Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 512 (4th Cir. 1994).

A comment by Eileen Heck at age 68 to a 66 year old executive employee who was also a personal friend that one reaches an age where it is nice to enjoy leisure time and smell the flowers would not directly reflect a discriminatory animus. The suggestion of retirement to an eligible employee whose

performance is unsatisfactory does not give rise to an inference of age discrimination. See Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 676 (8th Cir. 1998) ("[w]e do not think that suggesting retirement to an employee who is eligible for retirement, and who is not performing satisfactorily, provides a reasonable basis for inferring age discrimination"). A suggestion by Bruck Heck to an executive employee, even one who had not fallen asleep in meetings, that he seemed tired and should take some vacation time does not directly reflect a discriminatory animus based on age.[9] Plaintiff has not presented direct evidence of age discrimination.

Under the McDonnell Douglas burden-shifting framework, a plaintiff must first establish a prima facie case by showing that he was a member of a protected class; was qualified for the job he held or sought; was discharged or denied a position; and, was replaced by or rejected in favor of a person outside the protected class or sufficiently younger to create an inference of age discrimination, or otherwise present evidence sufficient to support an inference of unlawful discrimination. See Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 234 (3d Cir. 1999); Simpson v. Kay Jewelers, 142 F.3d 639, 644 n.5 (3d Cir.

[9]Plaintiff has not even claimed that age bias was a motivating factor in any action taken by Bruce Heck. To the contrary, plaintiff asserts that Mr. Heck was motivated by a desire to obtain plaintiff's duties for himself.

1998); Keller, 130 F.3d at 1108. For purposes of a prima facie ADEA case, the fourth element contemplates an age difference of at least five years. See Gutknecht v. SmithKline Beecham Clinical Laboratories, 950 F. Supp. 667, 672 (E.D. Pa. 1996).

The burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 319 (3d Cir. 2000). A plaintiff may still prevail by demonstrating that the employer's proffered reasons were not its true reasons but rather a pretext for unlawful discrimination. See Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 143 (2000); Goosby, 228 F.3d at 319.

A plaintiff must present evidence from which a factfinder could reasonably disbelieve the employer's proffered reasons, from which it may then be inferred that the real reason was discriminatory, or otherwise present evidence from which one could reasonably find that unlawful discrimination was more likely than not a determinative cause of the employer's action. See Hicks, 509 U.S. at 511 & n.4; Keller, 130 F.3d at 1108. To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in that reason that one could reasonably conclude

it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. See Hicks, 509 U.S. at 511.

Plaintiff has presented a prima facie case of age discrimination. He was more than 40 years old. He was qualified for the position he sought to retain.[10] He was not retained in the position and his duties were assumed by Bruce Heck who is 26 years younger.

The stated reasons for not renewing plaintiff's contract were Accupac's declining sales and profits, plaintiff's refusal to comply with a key element of the strategic plan to

[10]For purposes of a prima facie case, one is qualified for a position if he has the basic experience and education required to perform the functions associated with the position. Subjective qualifications including performance are appropriately addressed at the pretext stage. See Goosby, 228 F.3d at 320; Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990).

improve the company's financial well-being and the perception that plaintiff was becoming less focused.[11]

It is uncontroverted that Accupac's sales and profits declined from 1996 through 1998 when the company barely made a profit at all. Plaintiff suggests that there were economic and operational problems and that he was not responsible for the firm's declining sales and profits.[12] One cannot reasonably find from the competent evidence of record, however, that the Accupac board did not genuinely conclude plaintiff was responsible. As plaintiff acknowledged at his deposition, whether someone in his position is doing a "good job" is "measured on sales, profits" and of the two, "profits are more important than sales."

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[11]As noted, defendants also contend that plaintiff would not have been hired and, aside from any other deficiency, would have been terminated had they been aware of his prior falsification of business expense records. There is, however, no evidence that Accupac relied on any misstatement by plaintiff regarding this episode in contracting with him in 1992 or renewing his contract in 1995. It is not at all clear that a subsequent revelation of dishonesty in a prior position was a ground for terminating any of the employment contracts. Even assuming that any renewed contract would have been truncated on that basis, this would not defeat liability. See McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 359-60 (1995); Mardell v. Harleysville Life Ins. Co., 65 F.3d 1072, 1074 (3d Cir. 1995).

[12]Plaintiff also states that sales began to rise in 1999. He relies on a memorandum he sent to Bruce Heck on June 4, 1999 in which plaintiff expressed optimism about achieving sales of $22,000,000 by the end of the year. Sales for 1999 totaled $21,200,000 although the profit margin did not improve. In any event, the decision not to renew plaintiff's contract had already been made early in 1999 based on sales and profits for the prior three years.

That plaintiff may believe he was unfairly blamed for the deficiencies in his area does not establish pretext as it is the employer's belief that is important. See Fuentes, 32 F.3d at 765 ("the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is 'wise, shrewd, prudent or competent'"); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1304 (7th Cir. 1991) (inquiry regarding genuineness of nondiscriminatory reason "is limited to whether the employer's belief was honestly held"); Holder v. City of Raleigh, 867 F.2d 823, 829 (4th Cir. 1989) ("a reason honestly described but poorly founded is not a pretext"); Wilkins v. Eaton Corp., 790 F.2d 515, 521 (6th Cir. 1986) ("[t]he ADEA did not change the fact that an employer may make a subjective judgment to discharge an employee for any reason that is not discriminatory"); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa. 1995) (that a decision is ill-formed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995).

There is nothing suspect, implausible, unreasonable or unusual about a decisionmaker holding responsible for declining sales and profits from sales a person being paid $275,000 to be in charge of sales. This is all the more so when a person in such a position refuses to comply with a key element of a

strategic plan of top management to rectify the situation. That Eileen Heck may have suggested retirement to plaintiff as a more palatable way to conclude their relationship does not discredit the stated legitimate reasons. Plaintiff was 59 years old when he was recruited by Eileen Heck. He was 62 years old when Accupac renewed his contract in 1995. One cannot reasonably find from the competent evidence of record that the decision in early 1999 not again to renew plaintiff's contract would have been any different whatever his age might have been.

B. Breach of Implied Contract

Plaintiff has offered no response to defendants' motion for summary judgment on the breach of implied contract claim. In any event, plaintiff has presented no competent evidence of the existence of such a contract.

An implied-in-fact contract generally arises from the parties' conduct rather than verbalization. It is, however, a "true contract arising from mutual agreement and intent to promise." In re Penn Cent. Transp. Co., 831 F.2d 1221, 1228 (3d Cir. 1987). "The elements necessary to form an implied-in-fact contract are identical to those required for an express agreement." Id. (citing 1 S. Williston on Contracts § 3 (3d ed. 1957)). There must be, inter alia, a "manifestation of mutual assent" to the terms of the contract. Arnold Pontiac-GMC, Inc. v. Gen. Motors Corp., 786 F.2d 564, 572 (3d Cir. 1986). See also

Mid-Atlantic Equip. Corp. v. Cape Country Club, Inc., 1997 WL 535156 (E.D. Pa. Aug. 8, 1997).

Plaintiff appears to have based this claim on the fact that he and Ms. Heck had discussions about business that projected beyond the expiration of the express contract and a comment to Ms. Heck by plaintiff in 1997 that he hoped to work as long as he was able to which she then apparently responded "so would I." Business related discussions typically include future projections about sales, profits, taxes, capital investment and an array of other matters. The suggestion that any such discussion would constitute an extended promise of employment through the future period referenced is preposterous. The casual exchange reported between plaintiff and Ms. Heck in 1997 is meaningless.[13]

One reasonably could not remotely find that Accupac agreed to employ plaintiff beyond the term of his express employment contract.

V. Conclusion

One cannot reasonably conclude from the competent evidence of record that the legitimate reasons given for the non-

[13]At the time of these discussions, of course, the parties had an express contract providing for a specified period of employment. "No implied-in-fact contract can be found where the parties have an express contract concerning the same subject." McGrenaghan v. St. Denis School, 979 F. Supp. 323, 327-28 (E.D. Pa. 1997).

renewal of plaintiff's contract are incredible or unworthy of belief, or otherwise that plaintiff's age was a determinative factor in that decision. There is no evidence to support plaintiff's claim for breach of implied contract.

Defendants are entitled to summary judgment on the record presented. Their motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of December, 2002, upon consideration of defendants' Motion for Summary Judgment (Doc. #24) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendants.

BY THE COURT:

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JAY C. WALDMAN, J.